No. 12,826

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAWRENCE BARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Southern District of California.

PETITION OF THE UNITED STATES FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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To the Honorable, the United States Court of Appeals for the Ninth Circuit:

The United States of America, the appellee herein, by and through its attorneys of record, hereby petitions this Honorable Court to rehear the above-entitled case, and upon rehearing to grant the relief prayed for.

On May 6, 1952, this Court reversed the decision of the District Court. In so doing, the Court fell into error, we respectfully submit, through the use of the wrong statute.

This Court correctly held (Slip Op. 10) that since it is only necessary for the transaction to fall within

one of the subdivisions of Sections 112(b) to (e) in order to be classified as tax-free and thus postpone any recognition of gain or loss for tax basis purposes, it is necessary to consider the applicability of Section 112(b)(3).

This Court also correctly held (Slip Op. 7-8) that the Barker Delaware stock was acquired within the purview of Section 113(a)(12) of the Internal Revenue Code, and that the provisions of this section of the Code were first enacted in 1934 in order to make it clear that taxpayers who have acquired property in any taxable year beginning prior to January 1, 1934, under tax-free exchanges, where the basis is provided for in Section 113(a)(6), (7), and (9) of the Revenue Act of 1932, c. 209, 47 Stat. 169, must retain such basis, that is, the basis provided in the Revenue Act of 1932.

The Court having thus held that the Internal Revenue Code requires that the taxpayer retains the basis provided in the Revenue Act of 1932 if the 1923 transaction was a tax-free exchange and having further held (Slip Op. 8) that reference must be made to the tax law as it stood in 1923, the year of the transfer, to determine whether or not any gain in the value of the Barker California stock was recognized in that year, it follows that the Court should have tested the transaction by the definition of "reorganization" as contained in Section 112(i) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and in Section 202(c) of the Revenue Act of 1921, c. 136, 42 Stat. 227. These statutes are set forth at pages 3 to 5 of the Appendix to the Government's brief. Insofar as here pertinent, they contain identical definitions of the term "reorganization," namely, "a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock

and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation)."

Inconsistently with the holdings of the Court which we have referred to above, the Court, inadvertently we believe, tested the question of tax-free reorganization by the definition of "reorganization" as contained in Section 112(g) of the Internal Revenue Code. (Slip Op. 10-12.) The definition of "reorganization" contained in the Internal Revenue Code is, however, materially different from the definition in the applicable Revenue Acts of 1921 and 1932.

If the statutory provisions of the Revenue Acts of 1921 and 1932, which by Section 113(a)(12) of the Internal Revenue Code are required to be used, are applied to the transactions here involved, then, under the Court's own reasoning, the conclusion that there was a tax-free reorganization of Barker California into Barker Delaware must follow.

Viewing, as the Court did, the plan as a whole, Barker Delaware ended up with all of the stock and all of the assets of Barker California. That of course was literal compliance with the definition of "reorganization" contained in the Revenue Acts of 1921 and 1932. A gloss written upon the statute by the Supreme Court in *Pinellas Ice Co. v. Commissioner,* 287 U. S. 462, requires some substantial continuity of interest. Such a continuity of interest will exist where either common or preferred stock is issued to the transferor corporation or its stockholders. (*Helvering v. Minnesota Tea Co.,* 296 U. S. 378; *Nelson Co. v. Helvering,* 296 U. S. 374.) In the present case, as held by this Court (Slip Op. 12),

one group of stockholders of the old corporation ended up with control of the new corporation and the other group (that here involved) got an investment interest in the new corporation represented by preferred stock. It follows, *a fortiori* from the *Nelson Co.* decision, *supra,* that the transactions here involved constituted a "reorganization" within the purview of the 1921 and 1932 laws, for in the *Nelson Co.* case it was held that the transaction was a "reorganization" although none of the stockholders of the transferor received anything other than cash and preferred stock of the transferee.

If this Court, upon reconsideration, concludes, as we submit it should, that the transaction here involved between Barker California and Barker Delaware was a "reorganization" then there can be no question that the exchange by the Lawrence Barker group of their stock in Barker California for preferred stock of Barker Delaware was tax-free under Section 202(c)(2) of the Revenue Act of 1921, *supra,* for preferred stock is clearly a "security," and there would be within the purview of the statute the receipt by a person "in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorganization." See cases cited above and also *Helvering v. Watts,* 296 U. S. 387, where the exchange of stock for bonds in connection with a reorganization was held to be a tax-free exchange. Thus under Section 113(a)(6) of the Revenue Act of 1932, the basis of the Barker Delaware stock would be the same as in the case of the Barker California stock exchanged. And, as held by this Court (Slip Op. 12) "since the basis of the Securities Company stock is the same as that of the Barker Delaware stock," the basis of the Barker California stock

would therefore become the basis of the Securities Company stock. From this it would follow that the decision of the District Court should be affirmed.

Wherefore, the United States of America prays that this Honorable Court grant this petition for rehearing, with reargument of the case if deemed advisable by the Court, and that it affirm the decision below.*

Respectfully submitted,

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May, 1952.

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*Attention of the Court is also respectfully called to the fact that where reference is made on pages 7, 8 and 12 of the Slip Opinion to the agreed cost of the Barker Delaware stock, if measured in terms of the 1923 market value of the Barker California stock for which it was exchanged, the figure should be $100 instead of $219.35. See paragraph XIX of the Stipulation of Facts. [R. 32.] This $100 figure would be a stepped-up basis for the Barker Delaware stock which we submit is not properly to be used, but if used it would produce a basis of $219.38 for each of the Securities Company shares, while the taxpayer contends only for a basis of $219.35. The explanation of the difference in computation lies in the fact that the exchanges were not share for share.

Certification.

It is hereby certified by counsel for the appellee in the above-entitled case that this petition for rehearing is presented solely in good faith and because of the importance of the issue involved to the proper and efficient administration of the revenue laws, and in nowise for purposes of delay.

E. H. Mitchell,
Assistant United States Attorney,
Counsel for Appellee.

May, 1952.